IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 181 of 2004
with
CIVIL APPLICATION NO.4535 OF 2004

For Approval and Signature:

HON'BLE MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

C M S TRAFFIC SYSTEMS LTD

Versus

MUNICIPAL CORPORATION FOR THE CITY OF AHMEDABAD

Appearance:

1. Appeal from Order No. 181 of 2004
MR MIHIR THAKORE SR.ADVOCATE WITH MR UMESH SHUKLA AND
MR KUNJAL D PANDYA, ADVOCATES for Appellant.
SUDHIR NANAVATI. SR. ADV. WITH MR.SANJEEV DAVE
AND MR. RASESH PARIKH, ADVOCATES for opponent No. 1
MR HARDIK C RAWAL,ADV. for Respondent No. 2
MRS MH RAWAL, ADV. for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 22/07/2004

ORAL JUDGEMENT

1. At the joint request and with consent of the learned Advocates, the matter is taken up for final disposal. The matter pertains to challenge to an order passed below Exhs.6- 7 Notice of Motion in Civil Suit no.791/2004 dated 14th May, 2004, whereby the learned Judge is pleased to reject the Notice of Motion Application and vacate the ad interim relief granted on 16th March, 2004 which was extended from time to time. It is stated at the bar that the said ad interim relief was continued so as to enable the plaintiff-appellant herein to approach this Court. It is further stated that the said ad interim relief is in operation till today. The controversy involved in the matter relates to a tender invited by the Ahmedabad Municipal Corporation i.e. defendant no.1 in the suit invited tenders for design, supply, installation and commissioning of traffic signals at Narol-Naroda National Highway with (a) Microprocessor base vehicle actuated system, (b) Microprocessor base fixed time system with maintenance contract for three years. The Corporation laid down necessary eligibility criteria in Clause A.5.1 containing as many as six subclauses which reads as under:

"The bidder should be manufacturer of Traffic Signal Controller, Detector Cards, LED retrofit etc.

The bidder should have experience of not less than three years for fixed time traffic signals and two years for vehicle actuated traffic signal. Bidder should submit Respective performance certificates of vehicle actuated/Fixed time traffic signal system installed and supplied by them.

The bidder must possess proven track record of manufacturing and installing vehicle actuated/Fixed time signal system.

The bidders must have financial capability and having a 50 Lacs (Fifty Lacs) average annual turn over in each year for last three years (Pertaining to traffic signaling system only & bidder has to submit order copies.

The bidder should have experience of supply installation testing & commissioning of minimum 100 fixed time traffic junctions in each year (i.e. minimum 30 nos. of traffic junctions in

last three years) for fixed time traffic signals.

Vehicle actuated traffic signal bidder should have experience of Design, Supply, Installation, Testing & Commissioning of minimum five traffic junctions in each year (i.e. so minimum 10 nos of Traffic junctions in last two years."

Clause A.5.1.2 provided for` Marking Systems for Eligibility Criteria ' for Vehicle Actuated Traffic Signal/Fixed Time, whereby the necessary marks were to be allotted to the bidders. It was provided that, ` Those who obtain minimum 25 marks will be qualified for this tender.' Clause A.5.2 provided for ` general experience ' in which subclause A.5.2.1 titled as the "The bidder shall meet following minimum criteria". It had as many as ten items which are reproduced for ready reference:

"(1) The bidder shall have financial capability and having annual average turn over minimum of Rs.50 Lacs (Fifty Lacs) in each year for last three years.

(2) Execution of minimum 5 Vehicle actuated/minimum 10 Fixed time signal systems in each year satisfactorily and Maintenance of the same during last three years.

(3) Vehicle actuated/Fixed time Controller and LED Retrofits should be manufactured and tested in ISO approved facility.

(4) Tenderer shall have qualified traffic Engineers with them. Details of traffic Engineers with there (their)qualification, Experience shall be enclosed.

(5) Tenderer should have the signal maintenance experience of Three years in minimum three major cities of India. For fixed time signals. One years for vehicle actuated traffic signals Proof of the same shall be enclosed.

(6) Tenderers should have experience of supply and installation of minimum 500 nos. LED aspects or LED retrofits. Proof and performance certificate for the same should be enclosed in tender.

(7) Tender should submit the sample of LED retrofit of all colors and when asked to do so.

(8) Tender shall invariably enclose in tender the test report of recognized laboratory clearly indicating wattage and light output/brightness of LED samples.

(9) Tenders shall invariably submit the design & drawing of all junctions for signal design as per the quantities quoted.

(10) List of Major orders with performance certificates executed with reputed customers, Govt. & Semi Govt. bodies should be enclosed for ready reference."

Besides, the folowing facts, are not in dispute; that the plaintiff as well as defendant no.2 are the bidders in response to the aforesaid invitation to tender; that technical bid was opened on 18th November, 2003, that the commercial bid was opened on 23rd December, 2003; that the plaintiff had given notice dated 24th February, 2004, followed by statutory notice dated 28th February, 2004; that suit is filed on 16th March, 2004; that defendant no.1- AMC evaluated the tender as provided in Clause A.5 for, ` fixed time traffic signal' wherein the plaintiff (CMS) and the defendant no.2.(Nucleonics) had obtained 47 and 45 marks respectively. On the basis of the marks obtained, both were eligible for tender. The tender price which is recorded is also is not in dispute. CMS had quoted Rs.49,25,916/- while defendant no.2 had quoted 41,07,500/-. It is also on record that the Roads and Building Committee of AMC had passed Resolution no.1445 on 16th February, 2004 and Standing Committee passed Resolution no.1445 on 27th November, 2004 resolving that recommendation vide Resolution no.145 of the Roads and Building Committee dated 16th February, 2004, is granted approval.

2. The plaintiff approached the Court by filing the suit, praying that, " the Hon'ble Court be pleased to declare that the decision of defendant no.1 to qualify defendant no.2 in respect of second alternative of microprocessor base fixed time system with maintenance contract for three years and to award such contract to defendant no.2 and not to award such contract to the plaintiff is illegal, arbitrary, ultra vires, unfair, null and void and unenforceable. (emphasis supplied).

The plaintiff has also prayed for grant of permanent injunction restraining the defendant no.1 from issuing the final work order and awarding the contract for design, supply, installation and commissioning of traffic signals at Narol-Naroda National Highway No.8 in favour of defendant no.2 or any other tenderers. (emphasis supplied).

The plaintiff had also prayed for grant of a mandatory order to the effect that " defendant no.1 do award the contract for design, supply, installation and commissioning of traffic signals at Narol-Naroda National Highway No.8 in respect of either the first or the second alternative to the plaintiff."

Along with the suit Exhs.6 and 7 were filed being Notice of Motion, wherein the Court granted injunction on the day of filing of the suit i.e. 16th March, 2004 which continued not only till the Notice of Motion was finally heard and decided, but has remained operative till today.

3. Mr. Thakore, learned Sr. Counsel appearing for the appellant vehemently submitted that requirements contained in Clause A.5.2 are mandatory in nature and in view of the fact that defendant no.2 did not comply with some of the requirements provided therein, it was not open for defendant no.1-AMC to hold defendant no.2 as qualified bidder, to accept the bid and to award the contract in its favour. He submitted that awarding of the contract is not concluded so far. He submitted that condition no.3, 4 and 5 are not satisfied by defendant no.2, and therefore, he could not have awarded the contract. He submitted that the tender document is to be read as a whole and cannot be read in piecemeal so as to come to the conclusion that some of the terms are not mandatory but are directory in nature. He submitted that the opening part of Clause A.5.1.1 says that, " The bidder should be a manufacturer of Traffic Signal Controller, Detector Cards, LED retrofit etc.". This was to be read along with Clause (3) of A.5.2 which says that, " Vehicle actuated/ Fixed time Controller and LED Retrofits should be manufactured and tested in ISO approved facility." He submitted that this should be construed to mean that the manufacturer should have the facility of ISO and only then he will qualify himself for bidding in this tender. He further submitted that in Clause (4) it is provided that, " Tenderer shall have qualified traffic Engineers with them. Details of traffic Engineers with there (sick) their, experience shall be enclosed." should be construed to mean that the tenderer should have a traffic engineer with him before

he submits his bid then only he will qualify himself for bidding the tender. In this regard, he invited the attention of the Court to the written statement filed by defendant no.2 wherein it is stated in paragraph 10 that ....." It is also denied that the defendant no.2 has no qualified traffic engineer. In fact, the defendant no.2 has already appointed one Mr. Kamlakar Bhikhaji Karnik as Traffic Engineering Consultant on 20-12-2003 and Mr. Karnik has already accepted the appointment vide his endorsement dated 23-12-2003....." The learned counsel submitted that from this it is clear that defendant no.2 did not have a Traffic Engineer with him on the date of submitting the tender. He also submitted that requirement under Clause (5) of experience of three years in minimum three major cities of India', for fixed time signals, one year for vehicle actuated traffic signals for which proof was to be enclosed was also not fulfilled.

4. Learned Counsel submitted that according to him the conditions prescribed in Clause A.5.2 are mandatory in character, were required to be observed by defendant no.1-AMC in strict sense. That AMC could not have relaxed or waived in favour of defendant no.2 as it did not have power to do so as in the whole of the tender document. To substantiate his submission that the terms of Clause A.5.2 were mandatory in character, he invited the attention of the Cour to Clause A.5.9.1 which pertained to `joint ventures'. Clause a) i. has provided that,

> "That lead partner shall necessarily have experience in the supply, erection and commissioning of mechanical & electrical work (Refer para A.5.2) and shall meet not less than 60 per cent of all the qualifying criteria given in para A.5.2 and A.5.3 above".

Clause a) ii has provided that,

> " The other partners shall meet not less than 40 per cent of all the qualifying criteria given in para A.5.2 and A.5.3.1 above."

He submitted that the fact that 60% of the qualifying criteria are to be fulfilled by the lead partner and 40% of the qualifying criteria are to be fulfilled by the other partners, should be taken to mean that total 100% qualifying criterias are required to be fulfilled by a joint venture. He submitted that this also finds support from the contents of Clause A.5.9.2

which reads, " The post eligibility of a joint venture does not necessarily qualify any of its partners, individually, or as a partner in any other joint venture or association. In case of dissolution of a joint venture, each one of the constituent firms may qualify if they meet all the qualification requirements, subject to the written approval of the employer."

He submitted that from the aforesaid clause, it is clear that the requirements provided in Clause A.5.2 were mandatory in nature and it was not open for AMC to either relax or waive any of the requirements provided therein. He submitted that it is a well settled position of law that waiver in such matter could be only when there is a specific provision for the same and not otherwise. In this regard, he relied upon a decision of the Hon'ble the Apex Court in the matter of W.B. STATE ELECTRICITY BOARD V. PATEL ENGINEERING COLTD. AND OTHERS ((2002) 2 SCC 451). He invited the attention of the Court to the observations made by the Hon'ble the Apex Court in paragraph 24 which reads as under:

"The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/ instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and

> provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest."

5. Mr. Thakore, learned Sr. Counsel also relied on a decision of the Hon'ble the Apex Court in the matter of RAUNAQ INTERNATIONAL LTD v. I.V.R. CONSTRUCTION LTD. AND OTHERS reported in (1999) 1 S.C.C. 492 to substantiate his submission that, `relaxation can be made only if it is permissible under the terms of the tender.' In this regard, he invited the attention of the Court to paragraph 26 and 27. He submitted that in the case before the the Honourable the Apex Court, the relaxation was permissible under the terms of the tender, but then in the case on hand there is no such provision for relaxing or waiving any of the terms of the tender. The learned Counsel submitted that in that view of the matter, there being a prima facie case in favour of the plaintiff, the learned Judge has committed an error in not allowing the Notice of Motion and vacating the injunction granted on 16th March, 2004. He submitted that, therefore, this Appeal From Order be allowed and injunction which is operative till today be ordered to continue till final disposal of the suit. The order passed below Notice of Motion be quashed and set aside.

6. Mr. S.I. Nanavati, learned Sr. Counsel appearing for defendant no.1-AMC submitted that in the legal battle between the plaintiff and defendant no.2 the ultimate sufferer is the public at large which is not represented before the Court by any prominent Counsel like Mr.Thakore. He submitted that the members of the public are the real sufferers as they have to go on without traffic signals. He submitted that the commercial bid was opened on 23rd September, 2003 and work order was issued on 27th February, 2004 only on account of an injunction order which is operative since 16th March, 2004, work could not be proceeded with though defendant no.2 has paid the deposit as asked for by letter dated 27th february, 2004 on 28th February, 2004, and has also forwarded the contract papers which are not signed leaving the contract to be finally executed. The

learned Counsel submitted that besides there being no case on merits, the present Appeal From Order deserves to be dismissed on the ground of suggestio falsi and suppressio veri as the plaintiff has not approached the Court with clean hands having suppressed the material fact. The plaintiff having acquiesced in the matter by participating in the technical bid which was opened on 18th November, 2003. The plaintiff did not raise any objection at the relevant time which is raised in the suit. He submitted that thereafter the plaintiff participated in the `price bid' also which was opened on 23rd December, 2003. This shows the conduct of the plaintiff and on that ground alone the Appeal From Order be dismissed upholding the order passed in the Notice of Motion. He submitted that the contention that defendant no.2 is though not qualified is considered by defendant no.1-AMC by giving certain relaxations by waiving some of the terms contained in Clause A.5.2 is raised very late. The plaintiff had the knowledge of all this right on 18-11-2003 and it was further clear to him on 23rd December, 2003 still it is only after having known that defendant no.2 is the lowest, as an afterthought the suit is filed. After filing the suit injunction is obtained suppressing material fact which if disclosed to the learned Judge would have weighed with the Court and might not have granted the interim injunction. He submitted that this aspect is very succintly dealt with by the learned Judge in paragraph 14 of its judgment as under:

> ".....From reading of para 6 of N.M. application, it is evident that plaintiff was well within the knowledge of issuance of work order. But, for the reasons best known to the plaintiff, it used the words Provisional work order. This Court has never come across word like provisional work order in a contractual matter. Further, from the said paragraph, it could be inferred that plaintiff was well within knowledge that the work order in question has been issued much prior to filing of the suit. Still, however, it seeks relief of temporary injunction restraining defendant no.1 from issuing final work order and awarding contract in question in favour of defendant no.2 or any other tenderers. In other words, the plaintiff uses the words like "provisional" and " final work" order so as to create impression as if, there is a chronological stage like provisional work order and final work order in a contractual matter. Therefore in court's considered opinion, this is nothing but jugglery of the language employed

with a sole view to suppress material facts while seeking equitable relief from the court....."

6. Mr. Nanavati, the learned Sr.Counsel next submitted that so far as the contents of Clause A 5.2 are concerned, the same cannot be said to be mandatory because they provide for additional qualities of the bidder, so as to see that if a contract is awarded to a qualified tenderer, its performance is smoothened. He submitted that Clause A.5 of the tender document pertains to the qualification criteria for tenderers. It is divided into various sub-clauses like A.5.1,, A.5.1.2, A.5.2. What is provided in Clause A.5.1 and A.5.1.2 is conclusive. In a tabular form assessment of the eligibility of the bidders is to be made. There it is provided in specific terms that, " Those who obtain minimum 25 marks will be qualified for this tender." He submitted that thus it was on the basis of the marks obtained by individual bidder, it was to be decided as to whether one is qualified or not. He submitted that it was not in dispute that, both, the plaintiff and the defendant no.2 are qualified vide the said marking system. As according to the AMC what is provided in Clause A.5.2 is only additional to the main requirement for eligibility, with a view to see that the performing of the contract is smooth enough.

7. In the alternative, learned Sr. Counsel submitted that assuming for the sake of argument that what was provided for in A.5.2 was to be fulfilled by a bidder to be qualified, then also, it was well within the power of defendant no.1-AMC to relax or waive one or more of the requirements provided therein not amounting to " major modification ".

8. The learned Sr. Counsel submitted that the appellant original plaintiff is not entitled to any relief on more than one grounds mentioned hereinabove. He submitted that to reiterate, on the ground of delay and acquiescene itself the appellant is liable to loose. He relied upon a decision of the Hon'ble the Apex Court in the matter of RAMANA DAYARAM SHETTY V. INTERNATIONAL AIRPORT AUTHORITY OF INDIA AND OTHERS reported in AIR 1979 SC 1628 to support his contention that,` when a party delays approaching the Court it loses its right to get equitable relief.' He relied upon the following observations:

"Moreover, the writ petition was filed by the appellant more than five months after the

> acceptance of the tender of the 4th respondents and during this period, the 4th respondents incurred considerable expenditure aggregating to about Rs.1,25,000/- in making arrangements for putting up the restaurant and the snack bars and in fact set up the snack bars and started running the same. It would now be most inequitous to set aside the contract of the 4th respondents at the instance of the appellant. The position would have been different if the appellant had filed the writ petition immediately after the acceptance of the tender of the 4th respondents but the appellant allowed a period of over five months to elapse during which the 4th respondents altered their position. We, are, therefore of the view that this is not a fit case in which we should interfere and grant relief to the appellant in exercise of our discretion under Article 226 of the Constitution."

The learned Sr. Counsel submitted that in the present case also, the contentions which are raised by the plaintiff by filing a suit in the month of March, 2004 could have been raised soon on opening of the technical bid on 18-11-2003. The plaintiff neither raised any objection before defendant no.1-AMC nor chose to approach the Court of law. Thereafter, again on 23rd December, 2003, there was an opportunity for the plaintiff to raise objection and/or to approach the Court of law but then the plaintiff did not do so. He submitted that the plaintiff served the AMC with a notice on 24th February, 2004, and thereafter, a statutory notice on 28th February, 2004 but then filed the suit only on 16th March, 2004. He submitted that, in that view of the matter, on this ground alone, no equitable relief is warranted, and the learned Judge has rightly rejected the Notice of Motion.

9. The learned Sr. Counsel submitted that in the matters of tender, the Court must keep in mind the `public interest' in forefront, more so, while exercising a discretionary power vested in it. He submitted that in the present case, if the injunction was not granted on 16th March, 2004, the work of installing traffic signals could have proceeded further. He submitted that these traffic signals are very badly needed on Narol-Naroda Highway. To emphasize the need he pointed out that during the year 2000-2003 total 1045 road accidents occurred on this Highway. Of these 1045 accidents, 125 were fatal accidents in which 132 human lives were lost. He submitted that assuming for the sake of argument that

the plaintiff has a very good case, then also, loss if any to the plaintiff can always be compensated in terms of money while deciding the suit finally, but loss of any human life on account of non providing of traffic signals will not be possible to be compensated in terms of money.

The learned Sr. Counsel submitted that this argument may not be taken to mean that he admits the claim of the plantiff in any manner. He submitted that this is only to justify the submission that grant of interim injunction in the matter involving public interest is wholly uncalled for, as it causes grave hardship to the public at large. He submitted that besides the dismissal of this Appeal From Order, the injunction granted on 16th March, 2004 which is operative till date be vacated forthwith and defendant no.2 be asked to expedite the work so that public could be provided with the long awaited/warranted traffic signals.

Mr. Nanavaty, the learned Sr. Counsel relied on the decision of the Hon'ble the Apex Court in the case of Raunaq International Ltd (Supra) to submit that,` in the matters of ` public interest',it should be the guiding factor and the Courts shall see that it is not sacrificed.' In this regard, he invited the attention of the Court to paragraph 10 which reads as under:

"What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work - thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation."

The learned Sr. Counsel further submitted that besides, the Hon'ble the Apex Court has cautioned the Courts by saying that, "Hence before entertaining a writ petition and passing any interim orders in such petitions, the Court must carefully weigh conflicting public interest. Only when it comes to the conclusion that there is an overwhelming public interest in entertaining the petition, the Court should intervene."

10. The learned Sr. Counsel submitted that in the plaint, the plaintiff has not alleged any `malafides' against defendant no.1-Ahmedabad Municipal Corporation and when `mala fides' are not alleged, it is not a matter which will warrant grant of interim injunction.

He submitted that in the same judgment the Hon'ble the Apex Court has observed that even in the cases where mala fides are alleged, the Court has to exercise its discretion cautiously. The observations of the Apex Court are:

" Where there is an allegation of mala fides or an allegation that the contract has been entered into for collateral purposes and the Court is satisfied on the material before it that the allegation needs further examination, the Court would be entitled to entertain the petition. But, even here, the Court must weigh the consequences in balance before granting interim orders.

11. The learned Counsel submitted that in this very judgment the Hon'ble the Apex Court was also considering the aspect of granting relaxation and has observed that, " Where the decision making process has been structured and the tender conditions set out the requirements, the Court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the Court should hesitate to intervene."

The learned Sr. Counsel submitted that these observations are squarely applicable to the facts of the present case. He submitted that firstly, there is no allegation of mala fides. Secondly, so far as `public interest' is concerned it is only `public interest' which is involved in the matter and by grant of interim injunction the `public interest' is adversely affected, that too, beyond repair. He, therefore, requested the

Court to dismiss this Appeal From Order and also to vacate the interim injunction with immediate effect.

12. The learned Sr. Counsel submitted that the submissions of the learned Counsel for the appellant-original plaintiff on one hand and the learned Counsel for defendant no.2 on the other are only to advance the interest of their respective clients. He submitted that the learned Counsel for the appellant is right in contending that the contents of paragraph A.5.2 are mandatory. While the learned Counsel for defendant no.2 is right in contending that the contents of paragraph A.5.2 are directory in nature. But then, he submitted, it is in fact for the author of the document to decide and declare before the Court as to what is the true character of the same. He submitted that defendant no.1-AMC has filed its affidavit wherein it is stated that the contents of Clause A.5.2 are " General terms" and do render a bidder unqualified if one or more are not fulfilled at the time of making a bid. He submitted that the qualifying standards are laid down by Clause A.5.1.2 and as is on record, both the plaintiff and defendant no.2 qualified by getting 47 and 45 marks respectively. He submitted that the stand of the Corporation is that conditions prescribed in Clause A.5.2 are to be fulfilled by the tenderer who is allotted the work contract. He reiterated that the terms contained in Clause A.5.2 are such which will ensure the smooth performance of the work. He submitted that they are to be enforced during the performance of the contract. Therefore, the case put forward by the plaintiff is not worth accepting.

13. Mr. Nanavati, learned Counsel next relied on a decision of the Hon'ble the Apex Court in the case of G.J. FERNANDEZ V. STATE OF KARNATAKKA AND OTHERS reported in (1990) 2 SCC 488, in support of his contention that, ` it is for the authority to consider about the sufficiency of information/document supplied or effect of delay in supply or non supply thereof. It is for the authority to decide as to what effect is to be given to a non conformity with any prescribed standard and as to whether any relaxation is to be given to such non conformity with the prescribed standard when it is not resulting in substantial prejudice or injustice to any of the parties or to public interest in general'. He submitted that any relaxation which is given by keeping in mind the aforesaid facts, cannot be said to be bad. He submitted that in the case on hand, assuming for the sake of argument that the conditions prescribed in Clause A.5.2 were to be fulfilled before submitting the tender and the AMC has waived with some of the terms contained

therein, the said waiver has not resulted into any prejudice, much less, a substantial prejudice or injustice to any of the parties. He submitted that, in fact, it is the ` public interest ' which is held high by the AMC while accepting the tender of defendant no.2. At this juncture, the Counsel submitted that even at the cost of repetition, he may be permitted to submit that in the present case, the plaintiff has disentitled himself by not raising any objection on the point of non eligibility of defendant no.2 soon after the technical bids were opened on 18-11-2003 or in any case after 23-12-2003 when the price bids were opened.

14. The learned Sr.Counsel submitted that it is well settled legal position that when deviation is of non essential or ancillary or subsidiary requirement, it is not fatal to the acceptance of tender. He submitted that, in fact, the decisions are to the effect that minor technical irregularity can be waived. In support of this submission, he relied on a decision of the Hon'ble the Apex Court in the case of PODDAR STEEL CORPORATION V. GANESH ENGINEERING WORKS AND OTHERS reported in (1991) 3 S.C.C. 272. He submitted that the Hon'ble the Apex Court was pleased to observe that, " As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance."

He submitted that the Hon'ble the Apex Court has very succinctly expressed its view point by observing that the requirements in a tender notice can be classified into two categories, those which lay down essential conditions of eligibility and the others which are of second category. Therefore, assuming for the sake of argument that defendant no.1-AMC deviated or relaxed certain conditions which in its opinion were not of the first category then such deviation will not call for an interference of this Court.

15. The learned Sr. Counsel next relied on a decision of the Hon'ble the Apex Court in the matter of MAHADEO SAVLARAM SHELKE AND OTHERS v. PUNE MUNICIPAL CORPORATION AND ANOTHER reported in (1995) 3 S.C.C. 33, in support of his submissions regarding `grant of interim injunction'. He submitted that as is laid down by the Hon'ble the Apex Court, `an interim injunction is required to be granted only when the plaintiff seeking injunction is able to show a prima facie case, triable issue and balance of convenience in his favour'. He

submitted that in the case on hand also, the plaintiff is not able to establish any of the three requirements i.e. ` prima facie case', ` triable issue' or ` balance of convenience' , and therefore, no interim injunction should have been granted and the one which is granted may be vacated forthwith.

16. Mr. Raval, the learned Advocate appearing for defendant no.2, besides adopting the arguments of Mr. Nanavati, the learned Sr. Counsel for defendant no.1 submitted that the contents of Clause A.5.2 are not mandatory. He submitted that if the contents of paragraph A.5.1.1 and contents of paragraph A.5.2.1 are compared, it will be clear that the contents of paragraph A.5.2.1 are supplementary to that of A.5.1.1. To illustrate this, he submitted that the first subclause of paragraph A.5.1.1 is, " The bidder should be manufacturer of Traffic Signal Controller, Detector Cards, LED retrofit etc." ; whereas subclause (3) of Clause A.5.2.1 is, " Vehicle actuated/Fixed time Controller and LED Retrofits should be manufactured and tested in ISO approved facility. The phrases in bold letters in A.5.1.1 denotes the bidder while in A.5.2.1 relates to the product. He submitted that the contention raised by the plaintiff is that, ` defendant no.2 does not possess ISO approved facility to manufacture the aforesaid products. He submitted that the mandatory requirement of the tender document is that, "The bidder should be a manufacturer and the product should be manufactured and tested in ISO approved facility, He submitted that, similarly, other contentions are raised only with a view to create confusions, that too, at a belated stage out of frustration. He submitted that having adopted the arguments of the learned Counsel for defendant no.1, he does not repeat the same. He however reiterated that there is delay and acquiescence on the part of the plaintiff. He submitted that the plaintiff was present all throughout the tender proceedings, namely, opening of the technical bid on 18-11-2003, which was the D'day as the plaintiff knew about the eligibility of defendant no.2. For the reasons best known to the plaintiff, he chose not to raise any objection may be that plaintiff was entertaining an idea that he is going to get the contract. He submitted that thereafter on 23rd December, 2003 when the commercial bid (price bid) was opened, the bid of defendant no.2 was the lowest and the plaintiff's was the second lowest. Even at that point of time, the plaintiff did not lodge any objection questioning the eligibility of defendant no.2. He submitted that in that view of the matter, plaintiff cannot be said to have a prima facie case. Similarly, the balance of convenience

is also not in favour of the plaintiff which may entitle him to an order of injunction.

17. Mr. Raval, learned Advocate appearing for defendant no.2 submitted that besides other submissions, the submission regarding `suppression of material fact' and ` obtaining of interim injunction by misguiding the Court' requires to be dealt with seriously. He submitted that the plaintiff made a show as if there are two different stages of issuing work orders like `provisional work order' and `final work order' and by so representing, the plaintiff obtained an order of injunction. The learned Judge in paragraph 14 of its order has recorded that, ` the Court was led to issue an order of injunction by representing that the work order is yet to be issued and in his ill design he used two terms ` provisional work order' and `final work order.' He submitted that even at the cost of repetition he be permitted to read the relevant part of paragraph 14 which reads, " ....From reading of para-6 of N.M. application, it is evident that the plaintiff was well within the knowledge of issuance of work order. But, for the reasons best known to the plaintiff, it used the words Provisional work order. This Court has never come across word like provisional work order in a contractual matter....". The learned Advocate submitted that from the said paragraph, it is clear that plaintiff had the knowledge of the fact that the work order is already issued, much prior to the filing of the suit. Still, however, temporary injunction restraining defendant no.1 from issuing final work order and awarding contract in favour of defendant no.2 or any other tenderers is obtained. The plaintiff used the words like `provisional work order' and `final work order' so as to create an impression as if, there are two stages for issuing work orders in chronological order like ` provisional work order' and `final work order'. The learned Judge has recorded that, "..... So, in Court's considered opinion, this is nothing but jugglery of the language employed with a sole view to suppress material facts while seeking equitable relief from the Court....".

18. Mr. Raval, the learned Advocate requested that this Appeal From Order be dismissed not only with costs but with `exemplary cost which may be ordered to be paid to defendant no.1, a public body, representing the public at large who is deprived of the facility of traffic signal. The learned Advocate for defendant no.2 invited the attention of the Court to Clause A.4.18.3 in support of his submission that there is a specific provision allowing waiver of ` minor informality' provided, it does

not constitute a `major modification'. For ready reference the clause is reproduced hereinbelow:

> "A responsive tender is one which accepts all the terms and conditions of the Tender Documents without any major modifications. A major modification is one which affects in any way the price, quality, quantity or completion of works or which limits in any way, any responsibilities or liabilities of the tenderer or any rights of the AMC, as specified in the Tender Documents. The AMC may waive any minor informality in a tender which does not constitute a major modification. However, the failure of successful bidder to pay ` Security Deposit' and signing the contract shall constitute sufficient grounds for annulment of the award of contract and forfeiture of the earnest money deposit, in which case the Owner/Engineer may award the contract to the next lowest evaluated responsive bidder. In the event of not finding any such bidders, the employer is empowered to call for new bids."

19. Having heard the learned Sr. Counsel for the parties at length, this Court is of the opinion that, a matter wherein prima facie the plaintiff is guilty of suppression of material fact while obtaining interim relief which has remained operative since 16th March, 2004 till date. Having considered all the aspects of the matter in light of the documents produced in the form of paper book and having perused the order the order passed by the learned Judge, more particularly, the observations made in paragraph 14, this Court has no doubt that the plaintiff indulged in suppression of material fact besides jugglery of words and by misleading the Court obtained the interim injunction.

20. On appreciation of the material as a whole, this Court is of the opinion that the conditions which are prescribed in Clause A.5.2 are ` general '- directions in character and not the `mandatory' one. Therefore, deviation/waiver of any one or more of them, by defendant no.1 does not vitiate the acceptance of the tender.

21. This Court is also of the opinion that the subject matter is of vital public interest because the project is of great importance, directly affecting the life of the people at large. Therefore, taking the inspiration from the observations of the Hon'ble the Apex Court in the decisions referred to hereinabove it is held that this is a case wherein interim injunction ought not

to have been granted, and the one which is granted, be vacated forthwith. Order accordingly.

22. In the result, this Appeal From Order fails and is dismissed with cost of Rs.50,000/- which will be roughly at the rate of Rs.500-/per day for the period for which the injunction has remained operative. The appellant-original plaintiff shall pay this amount to defendant no.1 within eight weeks from the date of receipt of copy of this order. However, no cost is awarded to defendant no.2.

23. In view of the order passed in main Appeal From Order, no order in Civil Application no.4535/2004.

(Ravi R.Tripathi,J.)

stanley-rrt.